ANN B. HILL NorthWestern Energy 208 N. Montana Ave., Suite 205 Helena, Montana 59601 Tel. (406) 444-8110 ann.hill@northwestern.com

Attorney for NorthWestern Energy

### DEPARTMENT OF PUBLIC SERVICE REGULATION BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MONTANA

NorthWestern Energy's Support of Recons		
LLC, and DA Wind Investors, LLC	Ś	DOCKET NO. D2017.0.30
NorthWestern Energy for a Declaratory Ruling on the Availability of Schedule QF-1 Rates to 71 Ranch, LP, Oversight Resources,	)	REGULATORY DIVISION DOCKET NO. D2017.6.56
IN THE MATTER OF the Petition of	)	

Contrary to the developer's response to NorthWestern Corporation d/b/a/ NorthWestern Energy's ("NorthWestern") request for reconsideration, the Montana Public Service Commission ("Commission") did not abandon its totality of the circumstances test in Final Order No. 7574 ("Final Order"). Instead, the Commission arbitrarily failed to even recognize that the test existed. Nowhere in its analysis does the Commission even mention the *Kenfield* order or the totality of the circumstances test that it adopted in that order. That order and the totality of the circumstances test is still applicable law. The Commission's failure to apply applicable law results in a Final Order that is unlawful, unjust, and unreasonable. *See* ARM 38.2.4806(1).

 $<sup>^1</sup>$  See In the Matter of the Petition of Kenfield Wind Park, LLC, Docket No. D2010.2.18, Order No. 7068b.

# I. The Commission Must Apply a Totality of the Circumstances Test to Determine Eligibility for Standard Offer Rates

The totality of the circumstances test is still the law that this Commission must consider when determining whether a Qualifying Facility ("QF") is a single project or more than one project. The Commission did not change this test through subsequent regulation. Neither the Federal Energy Regulatory Commission ("FERC") nor state or federal courts have over-turned the totality of the circumstances test. When that test is applied to the facts of this case, the result is a determination that the QFs' proposed facility is one 9-megawatt project that does not qualify for standard rates.

## A. The Commission Did Not Change the Totality of the Circumstances Test in the 2015 Rulemaking

The Commission implemented the totality of the circumstances test in Final Order No. 7068b dated June 22, 2010. As stated in that order, "The PSC will consider the totality of the circumstances when determining whether a QF project is a single project..." Order No. 7068b, ¶ 73. The developers in this docket argue that the Commission changed this test in 2015 when it changed ARM 38.5.1902(5) through a formal rulemaking. The Commission took no such action. As stated in the Notice of Commission Action issued September 14, 2015 in Docket No. D2015.8.63, the Commission opened the 2015 rulemaking to address its rules requiring a competitive solicitation process for QFs. The result of the rulemaking was a change in the size of QFs eligible for standard offer rates. There was no change in the test the Commission uses to determine if a QF is one project or more than one project. In short, the *Kenfield* order, not ARM 38.5.1902(5), contains the test regarding whether a QF is a single project and not eligible for standard offer rates or whether a project is multiple projects that are eligible for those rates. The developers' collateral attack on the *Kenfield* order, over seven years later, is unpersuasive.

## B. The Laramie Decision Has No Impact on the Totality of the Circumstances Test

Both the Commission and the developers fail to recognize that the test adopted in the *Kenfield* order is modelled after FERC's totality of the circumstances test for market access found in 18 C.F.R. § 292.309, not FERC's One Mile Rule standard found in 18 C.F.R. § 292.204(a). In the Final Order in this case, the Commission never mentions Order No. 688, *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities* (October 20, 2006) ("FERC Order 688"), the authority it cited to in the *Kenfield* order. Instead, the Commission incorrectly applies the One Mile Rule to the facts of this case.

In contrast to FERC's One Mile Rule standard, the test for market access explicitly contains a rebuttable presumption for which further analysis is required. "There is a rebuttable presumption that a qualifying facility with a capacity at or below 20 megawatts does not have nondiscriminatory access to the market...The Commission shall not be bound by the one-mile standard set forth in § 292.204(a)(2)." 18 C.F.R. § 292.309(d). Consequently, paragraph 20 of the Commission's Final Order, which emphasizes that FERC's One Mile Rule is not a rebuttable presumption, is an erroneous application of law. The One Mile Rule and FERC's decision in *N. Laramie Range Alliance*, 138 F.E.R.C. ¶ 61,171 (2012) have no bearing on this case. The applicable law is the *Kenfield* order and its adoption of the totality of the circumstances test for market access.

Just as 18 C.F.R. § 292.309 contains a rebuttable presumption regarding QF size, so does ARM 38.5.1902(5). Just as FERC applies a totality of the circumstances test to address gaming the system, the Commission has, since 2010, also applied a totality of the circumstances test to address gaming. The Commission cannot now, seven years later, arbitrarily decide that the

totality of the circumstances test does not apply. There is no case law or change to regulation that allows the Commission to divert from the totality of the circumstances test.

### II. CONCLUSION

The Commission must reconsider the Final Order and apply the totality of the circumstances test to determine whether the QFs qualify for standard rates. Failure to follow established policy or standards is unlawful, unjust, and unreasonable. See Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997) citing Atchison Topeka and Santa Fe Railroad Co. v Board of Trade, 412 U.S. 800 (1973).

Respectfully submitted this 15th day of December 2017.

NORTHWESTERN ENERGY

ann B. Hell

Ann B. Hill

Attorney for NorthWestern Energy

### **CERTIFICATE OF SERVICE**

I hereby certify that NorthWestern Energy's Reply Brief in Support of Reconsideration in Docket No. D2017.6.56 has been hand delivered to the Montana Public Service Commission and the Montana Consumer Counsel this date. This filing has also been e-filed on the MPSC website and sent via First Class Mail to the remainder of the attached service list.

Date: December 15, 2017

Tracy Lowney Killoy

Administrative Assistant

Regulatory Affairs

Docket Service List Docket D2017.6.56 Pet for Declaratory Ruling

Will Rosquist MT Public Service Commission Box 202601 Helena, MT 59620-2601

Robert Nelson Jason Brown Montana Consumer Counsel P.O. Box 201703 Helena, MT 59620-1703

Errol T. Galt 71 Ranch, LP 40 71 Ranch Road Martinsdale, MT 59053 Ann Hill NorthWestern Energy 208 N. Montana Ave Suite 205 Helena, MT 59601

Tracy Lowney Killoy NorthWestern Energy 11 E. Park Butte, MT 59701

Bryan Rogan Oversight Resources, LLC 13 South Willson, Suite 6 Bozeman, MT 59715 Al Brogan NorthWestern Energy 208 N. Montana Ave Suite 205 Helena, MT 59601

Dick Anderson DA Wind Investors, LLC 3424 Hwy 12 East Helena, MT 59601

Joe Schwartzenberger NorthWestern Energy 11 E. Park Butte, MT 59701